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Supreme Court, U.S.
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No. 96-1183

In The

Supreme Court of the United States

October Term, 1996

FINALCO, INCORPORATED,

Petitioner,

vs.

THEODORE STEVEN ROOSEVELT,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Respondent respectfully represents that the question more properly before this Court is whether the effective date of a transfer otherwise sufficient to deny the discharge of a debtor under 11 U.S.C. § 727(a)(2) must also be perfected against a bona fide purchaser more than one year before a debtor files a bankruptcy petition.

LIST OF PARTIES

Respondent respectfully requests that this Court take judicial notice of the following facts:

1. The Petitioner, Finalco, Incorporated, is a Delaware corporation and has been assigned corporation number 069-1814 by the State of Delaware;

2. Finalco Group, Inc., is also a Delaware corporation and has been assigned corporation number 068-2828 by the State of Delaware.

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The Respondent, Theodore Steven Roosevelt, respectfully prays that the Petition for Writ of Certiorari, filed by the Petitioner Finalco, Incorporated to review the Opinion and Judgment of the United States Court of Appeals for the Ninth Circuit entered in this matter be denied.

OPINIONS BELOW

The Petition for Writ of Certiorari correctly recites the decisions rendered in the proceedings below.

CONSTITUTIONAL PROVISION, STATUTES AND RULE INVOLVED

Constitution of the United States, Article I, section 8, clause 4.

> The Congress shall have power to establish uniform laws on the subject of bankruptcies throughout the United States.

11 U.S.C. § 548(d)(1):

> For the purposes of this section, a transfer is made when such transfer is so perfected that a bona fide purchaser from the debtor against whom applicable law permits such transfer to be perfected cannot acquire an interest in the property transferred that is superior to the interest in such property of the transferee, but if such transfer is not so perfected before the commencement of the case, such transfer is made immediately before the date of the filing of the petition.

11 U.S.C. § 727(a)(2)(A) provides in pertinent part:

> (a) The court shall grant the debtor a discharge, unless —
>
> * * *
>
> (2) the debtor, with intent to hinder, delay, or defraud a creditor or an officer of the estate charged with custody of property under this title, has transferred, removed, destroyed, mutilated, or concealed, or has permitted to be transferred, removed, destroyed, mutilated, or concealed —
>
> (A) property of the debtor, within one year before the date of filing of the petition; . . . .

Delaware Code, Title 8, section 122(2) provides that:

> Every corporation created under this chapter shall have power to:
>
> * * *
>
> (2) Sue and be sued in all courts and participate, as a party or otherwise, in any judicial, administrative, arbitrative or other proceeding, in its corporate name.

Delaware Code, Title 8, § 510:

> If any corporation, accepting the Constitution of this State, and coming under Chapter 1 of this title, or any corporation which has heretofore filed or may hereafter file a certificate of incorporation under said chapter, neglects or refuses for 1 year to pay the State any franchise tax or taxes, which has or have been, or shall be assessed against it, or which it is required to pay under this chapter, the charter of the corporation shall be void, and all powers conferred by law upon the corporation are declared inoperative, unless the Secretary of State, for good cause shown to him, shall have given further time for the payment of tax or taxes, in which case a certificate therefore shall be filed in the office of the Secretary of State stating the reason thereof. On or before the last day of November in each year, the Secretary of State shall notify each corporation which has neglected or refused to pay the franchise tax or taxes assessed against it or becoming due during the year that the chapter of the corporation shall become void unless such taxes are paid on or before March 1 of the following year.

Federal Rule of Civil Procedure, Rule 17(b):

> **Capacity to Sue or Be Sued.** The capacity of an individual, other than one acting in a representative capacity to sue or be sued shall be determined by the law of the individual's

> domicile. The capacity of a corporation to sue or be sued shall be determined by the law under which it was organized. In all other cases capacity to sue or be sued shall be determined by the law of the state in which the district court is held, except (1) that a partnership or other unincorporated association, which has no such capacity by the law of such state, may sue or be sued in its common name for the purpose of enforcing for or against it a substantive right under the Constitution or laws of the United States, and (2) that the capacity of a receiver appointed by a court of the United States to sue or be sued in the United States is governed by Title 28, U.S.C. §§ 754 and 959(a).

STATEMENT OF THE CASE

This matter is based on facts which are unique to this case and arise rarely in the context of bankruptcy litigation. Petitioner's request for this Court to grant a Writ of Certiorari is therefore an attempt to satisfy the wishes of the Petitioner and does not involve a matter of national importance.

To further its petition to this Court the Petitioner presents a syllogism, unsupported by either evidence adduced at trial or by a citation to authority, that bankruptcy fraud is "rampant" and seeks to bootstrap from this unsupported allegation an opinion from this Court to the effect that neither Congress is competent to properly legislate to keep such alleged fraud in check, nor are the trial courts properly equipped to determine the factual basis as to when a transfer between a debtor and his transferee occurs. In the interest of comity, and to respect the authority of the trial courts, this request must be denied.

It was proved at trial in this matter that on June 10, 1989, the Respondent, Theodore Steven Roosevelt (Steven) and his then wife Judy, on the advice of a marital counselor, and in an attempt to save their failing marriage, executed a Marital Settlement Agreement, which set first forth the separate and community property of the Roosevelts, and then transferred to each of the Roosevelts such property as to effect a mutually satisfactory division of the property contained therein. Among the property contained therein was the family residence in Glendora, California. *In re Roosevelt (Ray v. Roosevelt)*, 176 B.R. 200, 202 (9th Cir. BAP 1994).

At trial the bankruptcy court heard uncontradicted evidence from third parties that the Roosevelts had contemporaneously discussed this transfer of assets with witnesses and further took evidence that in March of 1990, Judy Roosevelt asked for and obtained a quit claim deed from Steven pursuant the provisions of the Marital Settlement Agreement and then recorded this quit claim deed on April 14, 1990. Steven filed for bankruptcy on November 9, 1990. *In re Roosevelt (Ray v. Roosevelt)*, 176 B.R. 200, 203 (9th Cir. BAP 1994); *In re Roosevelt (Finalco v. Roosevelt)*, 87 F.3d 311, 313 (9th Cir. 1996).

The trial court concluded that the transfers effected by the document had been made by Steven with the intention to hinder, delay or defraud his creditors[1] but that Judy took under the Marital Settlement Agreement as a good faith transferee. *In re Roosevelt (Finalco v. Roosevelt)*, 176 B.R. 534, 535 (9th Cir. BAP 1995).

The trial court also held that the Marital Settlement Agreement was sufficient under California law to transfer

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1. Based on an erroneous conclusion that the transfers effected by the marital settlement agreement were without value. *In re Roosevelt (Ray v. Roosevelt)*, 176 B.R. 200, 205-206 (9th Cir. BAP 1994).

Steven's interest in the Glendora real property to Judy; that the complained of transfer of the Glendora real property occurred on the date of the execution of the Marital Settlement Agreement and therefore the date of transfer of Steven's interest in the Glendora real property by the Marital Settlement Agreement was more than one year before the filing of his bankruptcy petition and granted him his discharge. *In re Roosevelt (Finalco v. Roosevelt),* 176 B.R. 534, 535 (9th Cir. BAP 1995).

The gravamen of Petitioner's argument before the United States Bankruptcy Appellate Panel for the Ninth Circuit, as well as the United State Court of Appeals for the Ninth Circuit has been that the transfer of the Glendora real property between Steven and Judy was not effectuated unless and until the transfer was made effective against third parties. Both Judges Vollin and Hagan for the Bankruptcy Appellate Panel of the Ninth Circuit, as well as a unanimous Court of Appeals for the Ninth Circuit have rejected this contention. *In re Roosevelt (Finalco v. Roosevelt),* 176 B.R. 534, (9th Cir. BAP 1995) and *In re Roosevelt (Finalco v. Roosevelt),* 87 F.3d 311 (9th Cir. 1996), *modified and request for rehearing en banc den.*, 98 F.3d 1169 (9th Cir. 1996).

REASONS FOR DENYING THE WRIT

I.

FINALCO, INCORPORATED IS A VOID CORPORATION WITHOUT CAPACITY TO PROSECUTE THIS APPEAL.

Before addressing the propriety of granting a Writ of Certiorari, this Court should be appraised that both the Petitioner, Finalco, Incorporated, and its corporate owner, Finalco Group, Incorporated, are void corporations under Delaware law, without

capacity to either sue or to be sued under the laws of the State of Delaware.

Finalco, Incorporated, has been chartered as corporation number 069-1814, and Finalco Group, Incorporated has been chartered as corporation number 068-2828, both under the aegis of the constitution and laws of the State of Delaware. Corporate powers under the laws of the State of Delaware include the capacity to maintain and defend legal actions. Delaware Code, Title 8, section 122(2).

On March 24, 1997, I received from the office of the Secretary of State of Delaware, declarations under seal to the effect that the charters of both of Finalco, Incorporated, and Finalco Group, Incorporated have been voided by the state of Delaware effective March 1, 1997, in accordance with Delaware Code, Title 8, Section 510 and as a result ". . . all powers conferred by law upon the corporation are declared inoperative," including the right to sue or be sued.

While the Federal Rules of Civil Procedure are admittedly not binding upon this Court, their promulgation by this Court to the district courts indicates that this Court places great weight on their authority. The Respondent has not been able to find a case on point in which a court of competent authority has decided the issue of whether a corporation that had been stripped of its charter during the pendency of an appeal was either allowed or denied to proceed, nonetheless Federal Rule of Civil Procedure Rule 17(b) provides in pertinent part that:

"The capacity of a corporation to sue or be sued shall be determined by the laws of the state under which it was organized." (*Accord, see Weinstock v. Sinatra*, 379 F. Supp 274, 275-76 (C.D. Cal.1974) and *Crossman v. Vivienda Water Co.*, 150 Cal. 575, 580, 89 P. 355, 337 (1907)). This Court has

previously ruled in agreement with Rule 17(b), holding over a century ago that ". . . *nul tiel* corporation, or that the plaintiff is not and never was a corporation, is a good plea at bar, because it goes to show that the plaintiff can never maintain any action whatever, ..." *Baltimore and Potomac Railroad Company v. Fifth Baptist Church*, 137 U.S. 568, 572, 11 S. Ct. 185, 186, 34 L. Ed. 784 (1891).

Since Finalco, Incorporated, and Finalco Group Incorporation, as a void corporations under the laws of the State of Delaware, are therefore without the legal capacity to sue or be sued in this Court, the petition for writ of certiorari should be denied for this reason alone.

II.

THIS ISSUE IS FACT SENSITIVE, OCCURS RARELY, AND IS A MATTER WHICH, WHILE IMPORTANT TO THESE PARTIES, IS NOT ONE OF IMPORTANCE TO THE PUBLIC.

In setting a standing for the granting of a writ of certiorari this Court long ago held that:

> . . . it is important that we be consistent in not granting certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of authority between the circuit courts of appeal.

Rice v. Sioux City Memorial Park Cemetery, Inc., 349 U.S. 70, 79, (1955), *quoting* Chief Justice Taft in *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923).

The fact situation in which a valid transfer is made but not recorded at the time of transfer, the transfer is subsequently recorded, and then a creditor objects to the discharge of the transferring debtor on the basis of a fraudulent transfer has been a case of record, in addition to this case, only six times since 1907 (*Matter of Kock*, 20 B.R. 543 (Bankr. D. Neb 1982); *In re MacQuown*, 717 F.2d 859 (3rd Cir. 1983); *In re McKane*, 155 F. 674 (E.D.N.Y. 1907); *In re Munden*, 8 B.R. 142 (E.D. Va. 1981); *In re Plank*, 289 F. 900 (D. Mont. 1923) and *In re Roy*, 42 B.R. 102 (S.D. Fla.1984)). Of these cases, only *MacQuown* and the case at bar, have been the subject of a written opinion by a circuit court of appeals.

Contrast this paucity of cases with another recent bankruptcy related matter in which this Court did grant certiorari. In the case of *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 114 S. Ct. 1757, 128 L. Ed. 2d 556 (1994) this Court resolved the issue of what would be considered a "reasonably equivalent value" in the context of a foreclosure sale under 11 U.S.C. § 548(a)(2). In *BFP* this Court contrasted the three different standards of measuring reasonably equivalent value adopted in the circuit courts of appeal, *i.e.*, the so-called "*Durrett* rule" *Durrett v. Washington Nat. Ins. Co.*, 621 F.2d 201 (5th Cir. 1980), the case-by-case analysis used in the Seventh Circuit in *In re Bundles*, 856 F.2d 90 (7th Cir. 1988) and the "*Madrid* rule", first put forward in *In re Madrid*, 21 B.R. 424 (9th Cir. BAP 1982).

A review of Shepard's Citations for these cases, conducted on March 24, 1997, revealed that *Durrett* had been cited over 100 times in all of the circuit courts of appeal, as well as four state courts; that *Bundles* had been cited over 60 times in all of the circuit courts of appeal, and in one state court; and that *Madrid* and its adoption in the United States Court of Appeal for the Sixth Circuit in the case of *In the Matter of Winshall*

Settlor's Trust, 758 F.2d 1136 (6th Cir. 1985) had been cited over 100 times, in all of the circuit courts of appeal, and by two state courts.

BFP thus involved the settlement of an issue which was obviously "special and important to the public." This is not such a matter but is one which is merely of interest to the litigants, and concerns an episodic problem which is, at best, an academic problem more readily solved by the trial courts in their discretion. *C.f., Rice,* 349 U.S. at 74. For this reason, the Petition for a Writ of Certiorari should be denied.

III.

THE OPINION OF THE COURT OF APPEALS FOR THE NINTH CIRCUIT RENDERED IN THIS MATTER IS CORRECT.

The United States Constitution provides that the power of Congress is plenary in its ability to enact uniform laws on the subject of bankruptcy. U.S. Const., Art. I, § 8, cl. 4. In 1978, Congress exercised this plenary power in enacting a new Bankruptcy Code which was intended by Congress to be a complete rewrite of existing bankruptcy law [2]. As a result, among the issues considered by Congress in its enactment of a complete replacement of then existing bankruptcy law was the issue of when a transfer was considered to have occurred.

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2. "The bill is a complete rewriting of all of the bankruptcy law. It starts from scratch, because to attempt to make amendments to an 80-year-old law that has continually been amended during its long life would be to create an unintelligible and unworkable statute." Remarks of the Hon. Don Edwards, D-Calif., before the United States House of Representatives at the introduction of House Resolution 8200 which ultimately became Publ. L. 95-598, Title I, Nov. 6, 1978, 92 Stat. 2549, The Bankruptcy Reform Act, now codified at 11 U.S.C. §§ 101, *et seq.*, Cong. Rec. (Jan. 4, 1977), p. E 20.

Congress, in its 1978 enactment of 11 U.S.C. § 548(d) regarding the avoidance powers of the bankruptcy trustee provided that:

> **For the purposes of this section**, a transfer is made when such transfer is so perfected that a bona fide purchaser from the debtor against whom applicable law permits such transfer to be perfected cannot acquire an interest in the property transferred that is superior to the interest in such property of the transferee, ...

(Emphasis added). In this matter, the Petitioner has failed in his request that the trial court, as well as the Bankruptcy Appellate Panel for the Ninth Circuit and the United States Court of Appeals for the Ninth Circuit adopt this so-called bona fide purchaser rule in the context of 11 U.S.C. § 727. *See In re Roosevelt*, 87 F.3d at 316, but *see also In re MacQuown*, 717 F.2d 859 (3rd Cir. 1983); *In re McKane*, 155 F. 674 (E.D.N.Y. 1907); *In re Roy*, 42 B.R. 102 (S.D. Fla. 1984).

These Ninth Circuit Courts of Appeal, however, have rejected this rule on the basis that there is no such notice requirement in 11 U.S.C. § 727. This may readily be understood by contrasting the language enacted in section 548(d)(1), to the effect that a transfer is not made until effective against a bona fide purchaser, with that enacted by Congress when its adopted 11 U.S.C. § 727 in 1978. Section 727 provides in pertinent part that:

> (a) The court shall grant the debtor a discharge, unless —
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> * * *

> (2) the debtor, with intent to hinder, delay, or defraud a creditor or an officer of the estate charged with custody of property under this title, has transferred, removed, destroyed, mutilated, or concealed, or has permitted to be transferred, removed, destroyed, mutilated, or concealed —
>
> > (A) property of the debtor, within one year before the date of filing of the petition; . . . .

This statute is silent as to when a transfer is effective, and the trial court, as well as the Ninth Circuit Courts of Appeal which have heard this case have determined that a transfer is effective for the purpose of 11 U.S.C. § 727 when it is effective between the parties, *i.e.*, the so-called Party Rule. *See In Re Roosevelt*, 87 F.3d 317, for accord *see also Matter of Kock*, 20 B.R. 543 (Bankr. D. Neb 1982); *In re Munden*, 8 B.R. 142 (E.D. Va. 1981); and *In re Plank*, 289 F. 900 (D. Mont. 1923), all adopting the party rule.

This Court has previously held that "[I]t is generally presumed that Congress acts intentionally and purposely when it includes particular language in one section of a statute but omits it in another," *Chicago v. Environmental Defense Fund*, 511 U.S. 328, 338, 114 S. Ct. 1588, 1593, 128 L. Ed. 2d 302 (1994). Congress has therefore acted intentionally when, in enacting sections 548 and 727 of the Bankruptcy Code, it placed a bona fide purchaser requirement to determine the effective date of a transfer in the former section but left the date of a transfer to the discretion of the trial court in the latter.

This conclusion is given even greater credence under the general rule that the trial courts are uniquely positioned to determine facts and to assess the credibility of witnesses. *In re Roosevelt (Finalco v. Roosevelt)*, 87 F.3d at 318. The Party Rule adopted by the United States Bankruptcy Appellate Panel for the Ninth Circuit, and confirmed by the United States Court of Appeals for the Ninth Circuit conforms to both the principles of comity in recognizing the plenary nature of Congressional power and intent in enacting these statutes as it did, as well as the inherent authority of the trial courts in judging questions of fact and law in cases before them.

CONCLUSION

For the reasons set forth above, the Petition for Writ of Certiorari to review the Opinion and Judgment of the United States Court of Appeals for the Ninth Circuit should be denied.

Respectfully submitted,

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